

2009

The State of Utah v. Scott Tyler Stapley : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 SCOTT TYLER STAPLEY, : Case No. 20090318-CA
 :
 Defendant/Appellant. : Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from a judgment of conviction for attempted murder, a first degree felony under Utah Code Ann. § 76-4-102(1)(c)(i) (2008), entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Judith Atherton, presiding.

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JURISDICTIONAL STATEMENT

The trial court entered judgment against Appellant Scott Stapley for attempted murder, a first degree felony under Utah Code Ann. § 76-4-102(1)(c)(i) (2008). The judgment is attached as Addendum A. R. 150-51. After Stapley filed the notice of appeal, the Utah Supreme Court transferred the appeal to this Court. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j) (Supp. 2009).

STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION

Issue: Whether the trial court abused its discretion when it allowed the State to present gruesome and prejudicial photographs to the jury in violation of Rule 403.

Standard of Review: The determination of whether photographs are relevant is reviewed “for abuse of discretion. The determination of whether [they are] gruesome is a question of law, which we review for correctness. [And a] trial court’s ruling under rule 403 is reviewed for abuse of discretion.” *State v. Bluff*, 2002 UT 66, ¶ 47, 52 P.3d 1210 (internal citations omitted), *cert. denied*, 537 U.S. 1172 (2003).

Preservation: The issue was preserved at R. 41-43; 176:15-28; 172:68-69.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following provision is relevant to the issue on appeal and set forth at Addendum B: Utah R. Evid. 403 (2009).

STATEMENT OF THE CASE

Nature of the Case, Course of the Proceedings, Disposition in the Court Below

On July 31, 2008, the State filed an information against Stapley and co-defendant Cody Augustine for attempted murder with injury, a first degree felony offense. R. 1-3. The State later amended the information to include an enhancement. See R. 19-21 (dated September 2008). The trial court severed Augustine's and Stapley's cases. See R. 172:9.

On January 8, 2009, the defense filed a motion to exclude evidence, including gruesome photographs. R. 41-43; see also R. 67-83 (State's response). On January 12, the trial court held a hearing and denied the motion. See, e.g., R. 84; 94-100. On January 13, the two-day trial began. See R. 172; 171. At the end, the jury found Stapley guilty as charged. R. 148. On March 26, 2009, the trial court sentenced Stapley to a prison term of three years to life. R. 150-51. On April 13, 2009, Stapley filed a notice of appeal. R. 152. The appeal is timely. See Utah R. App. P. 3 and 4 (2009). Stapley is incarcerated.

STATEMENT OF FACTS

According to the State's evidence, early in the morning on July 29, 2008, Kathleen Ennis, was awakened by screams. R. 172:80-81, 85. Her 17-year-old son, Justin, was outside and bleeding. R. 172:82-83. She helped him into the bathtub and called 911. R. 172:83. Paramedics arrived and transported Justin to the hospital. R. 172:83-84.

According to Justin Ennis, he was awake early in the morning on the 29th. R. 172:90 (stating he did not go to bed the night before). He began exchanging cell-phone text messages with someone at 2:15 a.m. R. 172:90-92. He thought he was exchanging messages with Stacey, a girl he knew. R. 172:92-95 (describing the messages); see also R. 172:110 (describing Justin's relationship with Stacey and the nature of the messages). They agreed to meet, and at 4:09 a.m., "Stacey" sent a message saying "I'm here." R. 172:96. After a few more messages, Justin was outside waiting; it was 4:32 a.m. R. 172:96-98. He waited on the sidewalk. R. 172:98. His dad's service truck was parked on the street in front of the sidewalk. See R. 172:100; State's Ex. 2, 3.

Justin testified he saw a Nissan parked across the street. R. 172:99. He heard a door shut, and he heard co-defendant Cody Augustine run around the service truck. R. 172:101, 111. Justin turned to the west and saw Cody running at him with a knife. R. 172:101-02. Justin began running to the east, around the truck and into the street. R. 172:102. Stapley was in the middle of the street. R. 172:102-03, 111. "He had an axe in his hand, and he hit [Justin] in the back of the neck." R. 172:103. Justin continued to run and he was tackled by Cody. R. 172:112; 172:104. He tried to fight Cody and Stapley as they were "[t]rying to stab [him] and hit [him with their fists] and inflict pain." R. 172:104. Justin could not say whether he was hit more than once with the axe. R. 172:104. As he ran up the driveway, he was "being stabbed" by Cody. R. 172:104, 113.

Justin was struck 12 times. R. 172:106. His doctor, Thomas White, described the injuries. See R. 171:19. White described a laceration or puncture wound on the left upper back, a stab or a laceration wound higher on the left shoulder, and a wound across

the back of the upper neck. R. 171:19-20, 22 (stating the wounds were repaired in surgery). According to White, the cut on the back of the neck and a second wound on the shoulder at the same angle may have been caused by the axe and may have been inflicted in a single contact. See R. 171:24-25, 29.

Also, Justin suffered a puncture wound on the lower back side of his torso. R. 171:22. It was “quite deep and consistent with a stabbing sort of mechanism. And, in fact, we really couldn’t reach the depth of the wound with finger inspection or even with retractors. It was worrisome for a wound that had gone all the way in through the back into the abdomen.” R. 171:22. White performed CAT scans and discovered a hole in the colon, which required removal of a portion of the colon. R. 171:23. In addition, Justin had a complex wound across the front of his neck and left shoulder. R. 171:20. The wound required cleaning and further examination in the operating room. R. 171:21-22. According to White, the axe could have been involved in inflicting that injury. R. 171:25, 29. Also Justin had fresh wounds across the inside of his right hand. R. 171:21.

White testified that the wounds likely caused by the axe did not cause serious physical injury or substantial risk of death. R. 171:26-27, 31. The wound across the front of the neck and shoulder involved shoulder muscle. R. 171:27. Likewise, the wound on the back of the neck and shoulder “needed to be addressed, sutured, repaired. And then the wound was closed with suture material and staples.” R. 171:27. Justin was in the hospital for four or five days and was released without complications. R. 171:29.

Justin testified that he was left with scars on his throat, across his left shoulder, across the back of his neck, under his rib cage, on his right hand and across three fingers,

on his lower left back, on his chin, and on the left side of his face. R. 172:106-08. In addition, he has experienced problems with his left shoulder. R. 172:106.

Deputies Khong and Afatasi responded to the emergency call that morning. R. 172:119-20, 124-25. Khong described blood outside the house. R. 172:120. He determined Justin was first attacked on the sidewalk in front and then Justin went to the backyard and inside the house. R. 172:120-21. Afatasi went inside and spoke to Justin's mother. R. 172:125. Also, he walked through and around the house and observed blood in the entryway and back door, and "along the side of the house, to the street." R. 172:125. He found a necklace with an emblem in the front yard, R. 172:126, and he went to the hospital to obtain a description from Justin of the suspect car. R. 172:126-27.

Afatasi returned to the house at 6:30 a.m. and noticed a vehicle in the area matching the description that Justin had given. R. 172:127-28. Also, the vehicle had an emblem in the back window matching the emblem on the found necklace. R. 172:128.

Afatasi initiated a traffic stop. R. 172:129. The driver was Stapley. R. 172:129. He was with a friend, Chris Bird. R. 172:130. Afatasi pulled Stapley and Chris from the Nissan, placed them in the cruiser, and then "Mirandised them." R. 172:131-32. Afatasi noticed dried blood on Stapley's face. R. 172:131-32. He mentioned the blood and "that's when [Stapley] admitted to, you know, being part of the assault that occurred that morning." R. 172:131. Stapley told Afatasi that he had gone with Cody Augustine to "beat up Justin." R. 172:132.

According to Afatasi, Stapley saw Justin outside and "told Cody[,] if you are going to do something you better do it now. [T]hat's when Cody got out of the car.

[Stapley] followed with the axe” and “Cody and Justin got into an altercation.” R. 172:132. When Justin ran from Cody, Stapley “stopped [Justin] in front of the [truck], and swung and hit him in the shoulder.” R. 172:133. Stapley acknowledged hitting Justin a second time, see R. 171:103-05, and when Justin ran from him, he did not follow. R. 172:138. Cody followed Justin into the backyard. R. 172: 138.

Stapley told Afatasi the axe was gone. R. 172:134. He then worked with police to recover it. R. 172:137; 172:139-41 (Deputy Reyes recovered evidence from a backpack at a church); see also R. 171:34-46, 53 (Detective Adamson conducted interrogations, worked with Stapley to recover items, processed the scene at the Ennis home, and spoke with the doctor); State’s Ex. 16-33. Afatasi testified that he did not detect any indication of intoxication when he spoke to Stapley. R. 172:135.

Detective Adamson later interrogated Stapley again. R. 171:35. Adamson asked Stapley “if he ever thought that hitting someone with [the] axe would or could result in death.” R. 171:49 (agreeing to the question). In response, Stapley said, “I would be lying if I said I didn’t think it might, but I never really thought about it; I was just there to back up my friend.” R. 171:49 (agreeing to the response).

The State presented evidence of phone calls that Stapley made from the jail. R. 171:55-56; see State’s Ex. 35, 36. During the calls, Stapley referred to himself as a soldier, described luring Justin from the house, “swinging the axe and hitting” Justin, and getting between Justin and the house to block his escape. R. 171:60-61; State’s Ex. 15.

After the State presented its case in chief, the defense presented three witnesses. Chris Bird testified that on July 29, Stapley called early in the morning. R. 171:68. He

was in hysterics, panicked and scared. R. 171:69. Chris told Stapley to come over and Stapley told Chris what happened. R. 171:69. They drove around and went to McDonald's. R. 171:69. Stapley noticed his necklace was gone. R. 171:69. They drove back to Justin's neighborhood to see if the necklace was on the ground. R. 171:69. At that point, Afatasi pulled them over. R. 171:70.

Chris was familiar with Stapley's axe. R. 171:72-73. He collected and made exotic axes, swords and knives. R. 171:72. He considered Stapley's axe to be "a petty toy" and an ineffective weapon. R. 171:73. He compared it to a "roll of aluminum foil." R. 171:73. The prosecutor played a recording to the jury where Chris was interviewed by a news agency "and claimed that Stapley's weapon was a harmless toy." R. 171:74; 180. The prosecutor apparently found the recording through an internet search engine. R. 180. However, the prosecutor did not admit the recording into evidence or save it for inclusion in the record on appeal. See R. 171:74; 180.

Next, Michaela Gill testified that she and Stapley were best friends. R. 171:75. On July 28, she was with Cody and Stapley. R. 171:76-77. Cody talked about a sexually transmitted disease that he had contracted, and he talked about killing his girlfriend's ex-boyfriend. R. 171:77-78. In response, Stapley told Cody he had "toys." R. 171:78. Michaela thought nothing of the conversation. R. 171:78. When she went to bed at midnight, R. 171:76, Stapley was drunk, "stumbly," and "slurry." R. 171:78.

Stapley testified last. He and Cody had been friends for years. R. 171:83. He collected weapons, and he owned the axe recovered by officers. See R. 171:84; State's Ex. 9. He bought it at a "head shop" and paid \$25 or \$30. R. 171:84. He kept weapons

in his car. R. 171:85-86 (stating the axe and a table leg were in his car). On July 28, Stapley and Cody were drinking Seagrams 7 while Cody had a conversation with Michaela about a sexually transmitted disease. R. 171:83-84, 86. Cody was in pain from the STD. R. 171:87. He wanted the person, who gave the disease to his girlfriend, to pay. R. 171:87-88. And he wanted to go to the person's house that morning. R. 171:87-88. Stapley testified that when he heard his friend in pain, he "told him he wasn't going alone." R. 171:88. "I told him I'd be there for him. I'd go with him." R. 171:88. Stapley saw Cody sending text messages. R. 171:88.

At some point, Cody and Stapley got into Stapley's car and drove to Justin's house. R. 171:89. They parked on the street and noticed Justin pacing back and forth. R. 171:89. He started walking toward the house and was between a utility truck and a chain-link fence. R. 171:89. Stapley testified that "[i]f something was going to go down, it should go down right then." R. 171:89. He told Cody "now or never. If you are going to go, go. I'll be right behind you." R. 171:90. Stapley went to the middle of the street and watched Justin run from Cody "right towards me." R. 171:90.

Stapley swung the axe because Justin was coming at him and it was a reflex. R. 171:90. He knew he made contact. R. 171:91. Stapley watched Justin double back and Cody "was right there." R. 171:91. Cody and Justin collided and wrestled. R. 171:91. Stapley circled around to make sure no one else was there, and when he turned again, Justin ran right into him. R. 171:91. Stapley was thrown off balance and overcorrected and swung at the same time. R. 171:91, 92. According to Stapley, he hit Justin with his fist and Justin ran "through the axe" for the second injury on the front of Justin's body.

R. 171:92, 103; see also R. 171:103-05 (reflecting Stapley's written statement where he stated he hit Justin on the right shoulder with the axe, then went after Justin and hit him a second time in the left shoulder); 171:115 (stating Stapley hit Justin twice).

Justin "continued to run" and Cody followed. R. 171:92-93. Stapley did not follow; he was drunk; he heard screaming. R. 171:93. He hesitated for ten seconds then he screamed to Cody, "get the f--- out of there." R. 171:94. "Let's get out of here. Let's bail." R. 171:94. When Cody returned, he was covered in blood. R. 171:94. They got into the car, Stapley drove Cody home, and he drove to his own house and called Chris. R. 171:95. Stapley put the axe in a backpack. R. 171:95-96. When Chris returned his call, Stapley was emotional. R. 171:96. He went to Chris's house, told Chris what he had done, and gave Chris the backpack. R. 171:96. Chris and Stapley drove back to Stapley's house, went to McDonald's, and drove to Justin's neighborhood for Stapley's necklace. R. 171:97.

When Afatasi pulled them over, Stapley confessed. R. 171:97-99. He cooperated in the recovery of the axe, and he acknowledged that when Adamson asked if the axe could result in death, Stapley said, "I'd be lying if I said I didn't know. . . but it takes intent." R. 171:100. Also, Stapley told Adamson that he went to Justin's house because he was "trying to be a good friend. A good friend would have talked [Cody] out of it, but I was – I was still out there to protect my friend." R. 171:100-01. Stapley regretted his actions. R. 171:101. He never intended to kill Justin. R. 171:102.

After deliberations, the jury returned a verdict for attempted murder. R. 171:154. The trial court sentenced Stapley to a prison sentence of three years to life. R. 150-51.

SUMMARY OF THE ARGUMENT

The trial court erred when it admitted bloody photographs into evidence. The photographs were not relevant to the issues at trial. They were gruesome under Utah law, where they depicted enlarged and graphic shots of disturbing details. In addition, they were unfairly prejudicial and misleading to the jury. In this case, the jury likely rendered a verdict for the harshest offense because of the horrific photographs. Stapley respectfully requests that this Court reverse the jury verdict and remand the case for a new trial absent the gruesome photographs.

ARGUMENT

THE TRIAL COURT PREJUDICED STAPLEY BY ADMITTING GRUESOME PHOTOGRAPHS IN VIOLATION OF RULE 403.

A. UTAH’S THREE-STEP ANALYSIS.

Rule 403, Utah Rules of Evidence, states the following:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. Evid. 403 (2009). The Utah Supreme Court has ruled that “some categories of evidence, including gruesome photographs, are inherently prejudicial and should not be admitted absent a showing of ‘unusual probative value.’” *Bluff*, 2002 UT 66, ¶ 40 (citations omitted). “Evidence in these categories is uniquely subject to being used to distort the deliberative process and improperly skew the outcome.” *State v. Lafferty*, 749 P.2d 1239, 1256 (Utah 1988).

To ensure against a distortive process, “a court should undertake a three-step analysis when considering whether to admit” a photograph into evidence. State v. Calliham, 2002 UT 87, ¶ 35, 57 P.3d 220 (citing Bluff, 2002 UT 66, ¶ 46). Under the three-step analysis, the threshold question is “whether the photograph is relevant.” Id. (quoting Bluff, 2002 UT 66, ¶ 46); see also State v. Gulbransen, 2005 UT 7, ¶ 34, 106 P.3d 734. That is, the court will ask whether the evidence “has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” Bluff, 2002 UT 66, ¶ 42 (quoting Utah R. Evid. 401); see also Gulbransen, 2005 UT 7, ¶¶ 37-38 (stating a “stipulation of fact by defense counsel does not make evidence less relevant”; and “the ‘fact that the same evidence could have been provided by purely testimonial means does not necessarily make a photograph inadmissible’”) (citation omitted).

Next, the court will “consider whether the photograph is gruesome.” Calliham, 2002 UT 87, ¶ 35 (quoting Bluff, 2002 UT 66, ¶ 46). For that analysis, the court will look to the following non-exclusive factors.

First, we consider whether the photograph is in color or black and white, because color photographs are generally more disturbing because of their ability to provide the viewer with vivid images of blood, wounds, bruising, and the like. . . . Color alone is not determinative, however. . . . Second, we consider whether the photograph is an enlargement or close-up shot, again, because enlarged photographs and close-ups show greater detail and therefore are often more disturbing than a life-like view. . . . Also, an enlargement or close-up may give a distorted impression of the thing photographed. Third, we consider when the photograph was taken in relation to the crime and whether it depicts the victim as found at the crime scene. . . . Fourth, we consider whether other details in a photograph, aside from the victim, may render a photograph gruesome [because] the composition in the photograph may exacerbate the photograph's impact on the viewer.

Bluff, 2002 UT 66, ¶ 43 (alterations in original) (quoting State v. Vargas, 2001 UT 5, ¶ 52, 20 P.3d 271); State v. Barber, 2009 UT App 91, ¶ 60, 206 P.3d 1223. “The purpose of considering these factors is to identify photographs that have a tendency to ‘unfairly prejudice, inflame, or mislead the jury.’” Bluff, 2002 UT 66, ¶ 43 (citation omitted).

And finally, the court will apply a balancing test that hinges on whether the photograph at issue is gruesome or not. See Calliham, 2002 UT 87, ¶ 35. If it is gruesome, the burden shifts to the State to show that “the probative value of the photograph outweighs the risk of unfair prejudice.” Id. (quoting Bluff, 2002 UT 66, ¶ 46).

It is true that shifting the burden to the State runs contrary to the general presumption of admissibility favored by the Rules of Evidence. However, we have determined that this departure from the general rule is both necessary and equitable. The decision to admit a crime scene or autopsy photograph generally must be made early in the proceedings, before its probative value can be easily ascertained. Given that this evidence, by definition, has a tendency to confuse and inflame the jury, we believe it is appropriate for courts to err on the side of caution and exclude unfairly prejudicial evidence unless the State can show good cause for its admission.

Bluff, 2002 UT 66, ¶ 45 (footnote omitted). According to the Utah Supreme Court, a photo has “limited probative value” if it merely corroborates “uncontested facts” or the credibility of a witness whose testimony is not “of great importance in the case and hotly contested by the parties.” See Calliham, 2002 UT 87, ¶ 40.

On the other hand, “[i]f the photograph is not gruesome, the court may apply the standard rule 403 balancing test,” Bluff, 2002 UT 66, ¶ 44, which allows the State to admit the photograph in evidence “unless the defendant can show that the risk of unfair prejudice outweighs the probative value of the photograph.” Calliham, 2002 UT 87, ¶ 35 (quoting Bluff, 2002 UT 66, ¶ 46).

In State v. Poe, the trial court abused its discretion by admitting slides of the victim's dissected brain cavity because there was no question that the victim died of bullet wounds to the head and the "only purpose served was to inflame and arouse the jury." 441 P.2d 512, 515 (Utah 1968). Although "[i]t could very well be that the jury would have returned the same verdict absent its view of the slides," the supreme court reversed because the slides may "have tipped the scales in favor of the death penalty." Id. Similarly, in State v. Wells, the supreme court ruled that the trial court erred by admitting three color photos of the bullet wound – one with the shirt on, one with the shirt removed and dried blood, and one with the shirt removed and no blood. 603 P.2d 810, 812-13 (Utah 1979). The photos had "no evidentiary value" because the defendant "did not dispute shooting" the victim. Id. at 813. Thus, the only purpose served in admitting the photos was the "hoped-for emotional impact on the jury." Id. Notwithstanding the error in admitting the photos, the supreme court affirmed the conviction because a "review of the entire record" showed harmless error. Id. (citation omitted).

In Bluff, the supreme court determined that autopsy photos were admissible. There the defendant was charged with murder, child abuse, and child sexual abuse in connection with the death of her three-year-old child. 2002 UT 66, ¶ 1. At trial, the defendant claimed the child fell down the stairs, and she claimed she was unaware of the child's injuries. Id. at ¶¶ 11-12. The State presented photos of the child. "Each of the four photographs" was in color, and enlarged, but they presented little danger of unfair prejudice because they depicted "cleaned wounds and little, if any, blood." Id. at ¶¶ 49-50. Also, the photos did not "distort the 'thing photographed in any way. Not one of the

photographs was taken at the crime scene.” *Id.* at ¶ 50.

Moreover, the photos were “highly probative of the State’s contention that [defendant] knew about [the child’s] injuries and that the injuries did not result from an accidental fall down the stairs.” *Id.* at ¶ 53; *see also id.* at ¶ 51 (stating that “details in the photographs” were unpleasant “due to the injuries inflicted on [the victim],” but the pictures accurately showed the injuries). The “probative value of the photographs substantially outweighed any prejudicial effect.” *Id.* at ¶ 53; *see also Gulbransen*, 2005 UT 7, ¶ 39 (stating a close-up monochromatic photo was not gruesome); *Calliham*, 2002 UT 87, ¶ 40 (stating photos were admissible even though they “posed a risk of unfairly prejudicing the jury,” because they corroborated the “credibility of” a witness whose testimony “was of great importance” and “hotly contested”); *Vargas*, 2001 UT 5, ¶¶ 50, 53-56 (stating that autopsy photos showing the victim’s shaven head and fractured skull were “in color, close-up, slightly enlarged, and depicted the body after it had been moved from the crime scene”; nevertheless the photos were not gruesome or inflammatory).

B. THE THREE-STEP ANALYSIS COMPELS THE DETERMINATION THAT THE PHOTOGRAPHS HERE WERE INADMISSIBLE.

Prior to trial, the defense made a motion to exclude photographs of Justin’s wounds. *See* R. 41-43; 176:15-19 (moving to exclude photographs and stating the prosecutor has “other means and methods for describing” the wounds with diagrams, drawings, or descriptions). The trial court held a hearing and ruled the State would be limited to presenting one photograph of each injury. R. 99; 176:27-28 (stating where there are two photos of an injury, “I simply will have you limit it to one”); *see also* R. 94-100 (the

court's order).¹ A copy of the trial court's ruling is attached as Addendum C.

The State introduced the photographs as exhibits 10 through 14. The photographs depict open wounds and caked blood on Justin's torso. Specifically, exhibit 10 shows a stab wound on the left upper back and two puncture wounds on the left shoulder; exhibit 11 shows a laceration across the back of Justin's neck, two puncture wounds on the back of his left shoulder, and a wound on the back of the right shoulder; exhibit 12 shows Justin's face, neck, and chest caked in blood, an open wound across his left front shoulder and a wound across the front of his neck; exhibit 13 is a closer view of the wound running across the front of Justin's neck and the wound on his front right shoulder; and exhibit 14 shows a puncture wound on the lower left side of his torso and lacerations across his right hand. See State's Ex. 10-14. The photographs are attached as Addendum D. The trial court abused its discretion in admitting them in evidence.

(1) *The Photographs Failed the Threshold Question of Relevance.*

Under the threshold question of relevance, Stapley acknowledged he hit Justin with the axe. He swung the axe and he knew he made contact the first time, then he

¹ Although the trial court made "findings of fact" for its order on the motion in limine, see R. 94-96, it did not receive testimony on the issues. See R. 176. Also, the trial court did not assess witness credibility or competency. Id. Consequently, this Court will not give deference to the trial court's factual findings. See Matter of Adoption of Infant Anonymous, 760 P.2d 916, 918 (Utah Ct. App. 1988) (refusing to give deference to findings where "no evidentiary hearing was held," and stating "this court is in as good a position as the trial court" to examine the issue de novo) (citation omitted); see also State v. Killpack, 2008 UT 49, ¶¶ 12, 18, 41-54, 191 P.3d 17 (recognizing the trial court made findings of fact in granting a 404(b) motion; and reviewing the matter for an abuse of discretion under the test for 404(b) evidence without reference to the findings or marshaling standard).

circled around and hit Justin a second time. R. 171:90-92. State's Exhibit 11 depicts the wound running from the back of Justin's neck to the back of his right shoulder. For the second hit, Stapley said Justin ran "through the axe." R. 171:92, 103; see R. 171:103-05 (reflecting Stapley's written statement that he hit Justin twice); 172:104 (Justin could not say whether he was hit a second time with the axe). State's Exhibits 12 and 13 depict the wound running across the front of Justin's neck and continuing to his left shoulder.

In this case, the photographs designated as exhibits 11, 12, and 13, had "limited probative value, serving only to corroborate uncontested facts." Calliham, 2002 UT 87, ¶ 40. That is, Stapley admitted repeatedly that he was "part of the assault that occurred that morning." R. 172:131; see also R. 171:69 (he told Chris Bird what happened); 171:99 (he made admissions to Afatasi). He acknowledged that he hit Justin with the axe. See R. 171:89-92, 103-05. He knew he made contact. R. 171:91, 92. Since he acknowledged his part in the attack, photographs depicting injuries caused by the axe were superfluous and irrelevant. In addition, photographs 12 and 13 were of the same wound. See State's Ex. 12, 13. By presenting both photographs, the State was in direct violation of the trial court's order. See R. 99; 176:27-28 (ruling the State would be limited to one photo of each injury).

Also, the photographs were irrelevant since the State called Justin and Dr. White to testify to the injuries. Justin stated he was struck 12 times. R. 172:106; see also R. 172:105-08 (describing injuries). White described a laceration on the back of the neck running to the back of the right shoulder as one site. R. 171:24-25; State's Ex. 11. And he described a complex wound across the front of the neck running to muscle on the front

left shoulder. R. 171:20, 25, 27, 29, 31; State's Ex. 12, 13. In addition, White described knife wounds, including a deep puncture wound on the left upper back, R. 171:19-20; State's Ex. 10; a wound higher on the left shoulder, R. 171:19-20, 22; State's Ex. 10, 11; a puncture wound on the lower left side of his torso "consistent with a stabbing sort of mechanism," R. 171:22; and fresh wounds across the inside of Justin's right hand. R. 171:21; State's Ex. 14. He described cleaning, examining, and repairing the wounds. R. 171:21-22, 23, 27. Given the testimonial evidence, the photographs were unnecessary.

Moreover, the exhibits depicting puncture wounds and knife stabs were not relevant to this case. Specifically, exhibit 11 in part, and exhibits 10 and 14 reflected deep puncture wounds on the back of the left shoulder (exhibits 10 and 11), a wound on Justin's lower chest (exhibit 14) and lacerations on his right hand (exhibit 14). Those wounds plainly were caused by Cody's knife. See, e.g., R. 172:104, 113 (stating Justin was stabbed by Cody); 172:106 (stating Justin was struck 12 times); see also 171:22, 28 (describing the deep puncture wound on the back lower left side of Justin's torso, and acknowledging it likely was caused by a knife); 171:92-94 (stating Cody followed Justin to the back of the house and Stapley heard screaming).

Yet Stapley was not charged as an accomplice to Cody's conduct. See R. 172:6-10 (denying the State's request to amend the information to charge Stapley as a party to Cody's conduct). He was not on trial for Cody's mental state or for the stab wounds caused by the knife. See id. He was on trial for his own conduct, his own mental state, and the injuries he caused. Consequently, the photographs depicting injuries caused by Cody were wholly unwarranted. See State's Ex. 10 and 14; State's Ex. 11, in part.

(2) The Photographs Were Gruesome.

Next, the photographs were gruesome. *See Bluff*, 2002 UT 66, ¶ 47 (stating “[t]he determination of whether a photograph is gruesome is a question of law, which we review for correctness”). State’s Exhibits 10, 11, 12, 13, and 14 are in color, and “color photographs are generally more disturbing because of their ability to provide the viewer with vivid images of blood, wounds, bruising, and the like.” *Id.* at ¶ 43 (citations omitted). In addition, each photograph is a close-up shot of a gaping laceration or a deep puncture wound with exposed tissue and fluid, and dried blood. *See* State’s Ex. 10-14; *see also* R. 176:16 (stating the photographs are “extremely troubling” to view). The close-up shots “show greater detail and therefore are often more disturbing than a life-like view.” *Bluff*, 2002 UT 66, ¶ 43 (citations omitted). Also, exhibits 12 and 13 are duplicates, apparently intended to compound the shock value. *See, e.g.* R. 99; 176:27-28 (ruling the State would be limited to one photo of each wound).

Moreover, since some photographs depict puncture wounds and injuries caused by Cody (State’s Ex. 10 and 14; State’s Ex. 11, in part), they “give a distorted impression,” *id.*, to the jury of injuries inflicted as a result of *Stapley’s* conduct. *See supra*, Part B.(1), herein. Indeed, the photographs contain “other details” aside from the injuries at issue in this case, and they were admitted in an effort to impact the viewer. *See Bluff*, 2002 UT 66, ¶ 43 (citations omitted). Also, the photographs were taken shortly after the crime and show fresh blood and tissue in wounds and dried blood covering Justin’s body. State’s Ex. 10-14. The factors for assessing whether the photographs are gruesome are met. The photographs were intended to shock and inflame the jury, State’s Ex. 10-14, and they

served to mislead the jury where the State included photographs of injuries inflicted by Cody. See State's Ex. 10, 14; see also State's Ex. 11, in part.

(3) The State Was Required to Establish the Probative Value of the Photographs.

Since the photographs were gruesome, the State was required to show that “the probative value of the photograph outweigh[ed] the risk of unfair prejudice.” Calliham, 2002 UT 87, ¶ 35 (quoting Bluff, 2002 UT 66, ¶ 46). The State failed to make that showing here. Indeed, the photographs – while horrific and disturbing – lacked “unusual probative value.” Bluff, 2002 UT 66, ¶ 45 (citation omitted). Since Justin and his doctor were able to testify to the details of each wound, the photographs added only shock value. Specifically, Justin testified that he was struck 12 times. R. 172:106. He described his wounds, and he removed his shirt to allow the jury to observe scars on his throat, across his left shoulder, across the back of his neck, under his rib cage, on his right hand and across three fingers, on his lower left back, on his chin, and on the left side of his face. R. 172:105-08. Also, he described problems with his left shoulder. R. 172:106.

In addition, Dr. White described each laceration and puncture wound, see R. 171:19-22; and he opined that some wounds were caused by a “battle axe,” R. 171:24-25, 29; and injuries were caused by an instrument that plunged deep. R. 171:20-22, 28 (recognizing the deep injuries likely were caused by a knife). Dr. White described cleaning, probing and examining the wounds, performing surgery, conducting tests, and suturing, dressing, and repairing each site. R. 171:21-23, 27. Nothing prevented White from diagramming or drawing injuries or explaining each wound with use of a chart.

Moreover, other witnesses were available to provide testimony about the wounds.

Justin’s mother, Kathleen Ennis, found Justin outside and bleeding. R. 172:82-83. She brought him into the bathroom and called 911. R. 172:83. Nothing prevented her from describing her observations. In addition, paramedics and police officers arrived and observed Justin and talked to him about the events that morning. See R. 172:83-84 (stating paramedics arrived); 172:126-27 (stating Deputy Afatasi met with Justin at the hospital).

Since the photographs lacked unusual probative value, their main purpose was to “inflamm[e] and arouse” the jurors and to overwhelm them with graphic photos of gaping, bloody wounds. See Poe, 441 P.2d at 515. The photographs were unusually prejudicial given the other methods available to the State to describe injuries that were not life threatening. See R. 171:26, 31 (stating the wounds likely caused by the axe did not cause serious injury or substantial risk of death); 171:27, 31 (stating the wound to the front of the neck and the left front shoulder hit muscle, but did not hit an artery). Under the balancing test, the limited probative value of the photographs was substantially outweighed by the danger of unfair prejudice, particularly since Stapley did not contest his involvement in the attack. See R. 172:131-33, 137-38 (reflecting Stapley’s admissions); 171:90-92 (reflecting Stapley’s testimony); 171:103-05 (reflecting Stapley’s written statement); see also Calliham, 2002 UT 87, ¶ 40 (stating gruesome photos have “limited probative value” if they serve “only to corroborate uncontested facts”). The trial court abused its discretion when it allowed the State to present the photographs in evidence.

In the alternative and in the event this Court rules that the photographs were not gruesome, Stapley must show that “the risk of unfair prejudice outweigh[ed] the proba-

tive value of the photograph[s].” Calliham, 2002 UT 87, ¶ 35 (quoting Bluff, 2002 UT 66, ¶ 46). Stapley made that showing in the trial court here. Specifically, Stapley repeatedly acknowledged his involvement in the events on July 29. R. 172:131-33, 137-38; 171:89-92, 103-05. He admitted he was with Cody and he used an axe to inflict injury on Justin. R. 171:89-92; see also 171:103-05 (reflecting Stapley’s written statement); 171:115 (stating Stapley hit Justin twice). Stapley cooperated with police officers and he answered their questions. R. 172:131-33, 137-38; 171:47-48. Under the circumstances, the jury was required to assess Stapley’s conduct and his mental state. See Utah Code Ann. § 76-1-501(2) (2008) (stating the elements relate to conduct and mental state).

The gruesome photographs were not probative of the issues, but served mainly to mislead and inflame the jury. They provided a “hoped-for emotional impact on the jury.” Wells, 603 P.2d at 813. Evidence is unfairly prejudicial if it confuses the jury, “‘appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish,’ or otherwise . . . ‘cause[s the] jury to base its decision on something other than the established propositions in the case.’” State v. Bartley, 784 P.2d 1231, 1237 (Utah Ct. App. 1989) (citations omitted); Diversified Holdings, L.C. v. Turner, 2002 UT 129, ¶ 38, 63 P.3d 686 (where evidence may have led to confusion, it was properly excluded).

Since Stapley acknowledged his involvement in the attack and the State had alternative methods for presenting evidence of the wounds, the photographs offered “‘scant’” or cumulative value and were presented “‘for the sake of [their] prejudicial effect.’” Bartley, 784 P.2d at 1237 (citations omitted); see also State v. Lindgren, 910 P.2d 1268, 1272 (Utah Ct. App. 1996) (recognizing that if evidence confuses the jury,

appeals to its sympathies, arouses its sense of horror, or provokes its instinct to punish, the evidence may be unfairly prejudicial and inadmissible); *Diversified Holdings, L.C.*, 2002 UT 129, ¶ 38 (stating that evidence leading to confusion or speculation about “what might have been” was properly excluded). Based on the balancing test, the trial court abused its discretion in admitting the photographs in evidence. The photographs violated Rule 403.

C. THE ERROR WAS HARMFUL.

The Utah Supreme Court has ruled that “[e]ven if the evidence was erroneously admitted, that fact alone is insufficient to set aside a verdict unless it has “had a substantial influence in bringing about the verdict.”” *Bluff*, 2002 UT 66, ¶ 47 (citations omitted). In addition, it has articulated the prejudice standard for evidentiary error as follows: “If, in the absence of the evidentiary errors, there is a reasonable likelihood of a more favorable outcome for defendant, we must reverse the conviction.” *State v. Rimmasch*, 775 P.2d 388, 407 (Utah 1989); *State v. Mitchell*, 779 P.2d 1116, 1122 (Utah 1989) (in assessing harm, the court will not apply the sufficiency-of-the-evidence standard; “rather, it focuses on the taint caused by the error”).

“In analyzing errors, we are guided by the fundamental principle that all the rules relating to the conduct of criminal trials are meant to provide a fair, reasonable and practical means of doing justice. Where the error is one in which the fundamental fairness of the procedure by which the result is reached is drawn into question so as to cast doubt on the result, then reversal is warranted.” *State v. Lenaburg*, 781 P.2d 432, 436-37 (Utah 1989) (internal citations omitted), abrogated on other grounds as stated in

State v. Deporto, 935 P.2d 484 (Utah 1997).

In this case, Stapley was prejudiced by the admission of the gruesome photographs since the photographs “tipped the scales in favor of” a conviction on the harshest offense. See Poe, 441 P.2d at 515; R. 171:154-55 (rendering a verdict for attempted murder). Specifically, the evidence in this case supports that Stapley did not go to Justin’s house with an intent to kill. R. 171:102; see also R. 171:49, 100. He intended to provide back-up for Cody. R. 171:88-90, 101. He swung at Justin the first time as a reflex. R. 171:90-91. And he swung at Justin a second time when he was knocked off balance. R. 171:91-92. Stapley did not inflict life threatening injuries. R. 171:26, 31. Thus, the evidence supported a verdict for a lesser offense. See Mitchell, 779 P.2d at 1122 (recognizing that prejudice is established if, absent the error, there is a likelihood that the defendant would be convicted of a lesser offense).

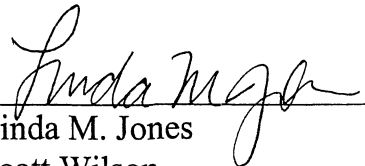
Indeed, the jury was instructed with respect to several alternative offenses, including the lesser offense of aggravated assault with serious bodily injury, a second degree felony under Utah Code Ann. § 76-5-103(1)(a), (2) (2008); and the lesser offense of aggravated assault with a dangerous weapon, a third degree felony under Utah Code Ann. § 76-5-103(1)(b), (3) (2008). R. 134; 140; 142. The evidence supported a verdict on those lesser offenses, where Stapley inflicted injuries and used a weapon. See R. 171:89-92 (admitting he used the axe); R. 171:26-27, 31 (stating the wounds inflicted with the axe were not serious and did not cause a risk of death, but the axe hit muscle). However, in this case, the gruesome photographs aroused a sense of horror in jurors, inflamed jurors, and provoked jurors to punish by rendering a verdict on the most severe

offense: attempted murder, a first degree felony offense. R. 171:154-55; Utah Code Ann. § 76-4-102(1)(c)(i). Given the prejudicial impact of the horrific photographs, the erroneous evidentiary ruling should undermine this Court's confidence in the verdict. Absent the error, there is a reasonable likelihood that the jury would have rendered a verdict on a lesser offense for aggravated assault. *See Mitchell*, 779 P.2d at 1122 (recognizing that prejudice is established if, absent the error, there is a likelihood that the defendant would be convicted of a lesser offense). This Court may reverse the conviction in this case due to the evidentiary error.

CONCLUSION

Based on the record and established law, Stapley respectfully requests that this Court reverse the conviction for a new trial.

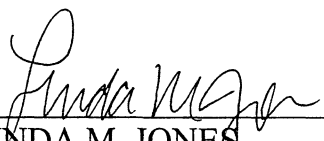
SUBMITTED this 15th day of March, 2010.



Linda M. Jones
Scott Wilson
Salt Lake Legal Defender Assoc.
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Linda M. Jones, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 1st day of March, 2010



LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this ___ day of _____, 2010.

Tab A

IMAGED

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
vs. :
SCOTT TYLER STAPLEY, : Case No: 081905752 FS
Defendant. : Judge: JUDITH S. ATHERTON
Date: March 20, 2009

PRESENT

Clerk: shantec
Prosecutor: NELSON, STEPHEN L
Defendant
Defendant's Attorney(s): WILSON, SCOTT A

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 3/20/09

DEFENDANT INFORMATION

Date of birth: September 15, 1986
Video
Tape Number: S45 Tape Count: 9.24.45

CHARGES

1. ATTEMPTED MURDER - 1st Degree Felony
Plea: Guilty - Disposition: 01/14/2009 Guilty

SENTENCE PRISON

Based on the defendant's conviction of ATTEMPTED MURDER a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than three years and which may be life in the Utah State Prison.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE RECOMMENDATION NOTE

Court recommends credit for time served.

Attorney Fees Amount: \$250.00 Plus Interest
Pay in behalf of: SALT LAKE COUNTY TREASURER

Restitution Amount: \$2848.42
Pay in behalf of: CRIME VICTIM REPARATIONS

Minutes Sentence, Judgment, Commitment @J



JD28413011

pages: 2

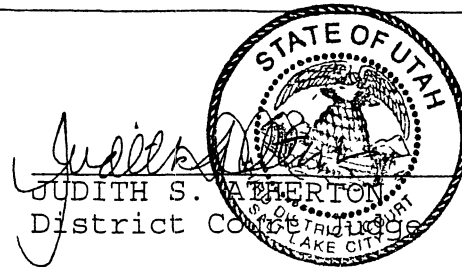
081905752 STAPLEY, SCOTT TYLER

1c

Case No: 081905752
Date: Mar 20, 2009

Restitution is ongoing.

Date: 3/20/09



Tab B

UTAH R. EVID. 403 (2009)

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Tab C

LOHRA L. MILLER
District Attorney for Salt Lake County
STEPHEN L. NELSON, 9547
MICHAEL S. COLBY, 8941
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ORIGINAL

FILED DISTRICT COURT
Third Judicial District

JAN 13 2009

SALT LAKE COUNTY

By _____
Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,)	
)	ORDER ON DEFENDANT'S MOTIONS
Plaintiff,)	IN LIMINE
)	
-vs-)	
)	
SCOTT TYLER STAPLEY,)	Case No. 081905752
)	
Defendant.)	Honorable Judith S.H. Atherton

THE ABOVE ENTITLED MATTER CAME BEFORE the Court for hearing and determination of the defendant's motions in limine on January 12, 2009. Scott Wilson represented the Defendant. Stephen L. Nelson and Michael S. Colby, Deputy District Attorneys for Salt Lake County, represented the State. Based upon representations of counsel, the Court now makes and enters the following:

I. Findings of Fact

1. The defendant's property, a necklace depicting the "hatchetman" logo of the Psychopathic Records label, was found at the scene of the offense;
2. The defendant was apprehended and arrested after driving by the scene of the alleged offense in a car with a large "hatchetman" sticker in the rear window while police officers were processing the crime scene;

3. The passenger of the defendant's car was found to be in possession of numerous weapons;
4. The police also found other weapons in the car within the defendant's constructive possession;
5. When the victim was taken to the hospital, a number of photos were taken of the victim's condition and the victim's injuries;
6. These photos depict the wounds the victim received from the defendants, and the blood that covered these wounds;
7. The photos are graphic, sobering, and may be possibly disturbing to some;
8. After the defendant Stapley was arrested, police arrested the defendant Augustine and interviewed him, wherein he made statements admitting to participating in the alleged offense, and admitting to being a "juggalo;"
9. According to Augustine's defense attorney, Augustine does not plan to testify at the trial, but rather plans to assert his privilege against self incrimination under the Fifth Amendment;
10. This case has generated a substantial amount of pre-trial publicity; local television cameras and newspaper reporters have attended almost every hearing on this matter;
11. In their written coverage of this case, both KSL and KTVX reference "juggalos." See <http://www.abc4.com/news/local/story/Two-men-attack-teen-with-medieval-battle-ax/Uk9xwt6VHkCd2sNqTLVWBw.csp>. See also <http://www.ksl.com/?nid=148&sid=3896502>;

12. It is not just the local media, however, who are interested in this case. For example, a [www.google.com](http://www.google.com/search?hl=en&rlz=1T4ADBF_enUS220US223&q=juggalo+axe+utah) search for “juggalo and axe and utah” yields 5,360 hits. See http://www.google.com/search?hl=en&rlz=1T4ADBF_enUS220US223&q=juggalo+axe+utah;
13. Important to note, is that many people in the community have strong feelings about this case. For example, 338 people have posted written comments about this case on KSL’s website site. See <http://www.ksl.com/index.php?nid=148&sid=3896502&comments=true>;
14. Some of these comments express positive feelings or even solidarity with the defendants, and some comments are quite negative against the defendants, and against “juggalos” and “juggalo” culture generally.

II. Conclusions of Law

1. The Utah Rules of Evidence define “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable ... than it would be without the evidence.” Utah R. Evid 401;
- a. “[A]ll relevant evidence is admissible [in Utah courts], except as otherwise provided ...” Id. At 402. Utah appellate courts give trial courts considerable discretion in deciding whether or not evidence submitted by a party is relevant. Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976);

- b. The Utah Rules of Evidence allow trial courts to exclude relevant evidence "... if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ..." Utah R. Evid. 403;
 - c. Because the defendant was wearing his "hatchetman" necklace during the attack on the victim (and left the necklace at the scene of the crime), and because the police were able to connect the defendant to the crime scene by his "hatchetman" sticker in the rear window of his car, both the defendant's "hatchetman" necklace and "hatchetman" car sticker are relevant to the trial in this case, and therefore admissible;
 - d. The State's witnesses, however, may not refer to these pieces of evidence as related to "juggalos" or "gang activity." In fact, the word "gang" may not be used at all in the State's presentation of its case;
2. The Utah Rules of Evidence provide that the "credibility of a witness may be attacked by any party..." Utah R. Evid. 607. Specifically, "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Utah R. Evid. 608;
- a. The Utah Supreme Court has said that juries need sufficient information to fully appraise a witness's biases and motivations. State v. Hackford, 737 P.2d 200 (Utah 1987);
 - b. "Juggalos" are a tight-knit community, and refer to each other as a "family;"

- c. If the defense witnesses are “juggalos,” they may have an interest in protecting the defendant and shielding him from culpability through their testimony which the State is able to explore in cross examination so that the jury may determine whether the witness is biased;
- 3. It is important that the voir dire process in this case will ensure fairness for both parties;
 - a. If a prospective juror is especially sympathetic towards “juggalos,” or especially hostile towards “juggalos,” it could impact their ability to impartially act as a juror in this case;
 - b. Because this Court, therefore, is interested in knowing what prior knowledge and feelings towards “juggalos” prospective jurors will bring to this case, this Court is authorizing the voir dire process in this case to include questions about jurors’ knowledge of “juggalos” and “juggalo” culture;
- 4. If a defendant objects to photographs of a victim’s injuries offered by the State on the basis that the photographs are likely to inflame the jury based on their graphic depictions, trial courts must first determine whether a photo is relevant, and then whether the photo is a gruesome photograph;
 - a. A photograph is relevant if it meets the standards of Rules 401, 402, and 403 of the Utah Rules of Evidence, described above.
 - b. State v. Vargas, 20 P.3d 271, sets forth a four-pronged test for determining whether a photograph is gruesome:

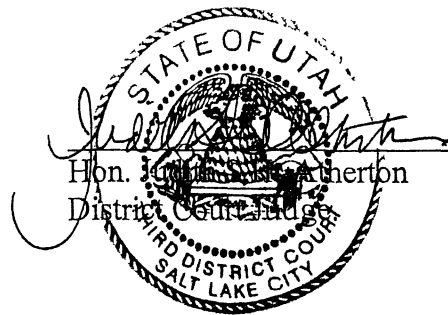
- i. First, whether the photograph in color or black and white;
 - ii. Second, whether the photograph an enlargement;
 - iii. Third, whether the photograph is taken at the crime scene or some other place; and
 - iv. Fourth, whether there are other details in the photograph, aside from the victim, that render a photograph gruesome;
 - c. The photographs in this case are relevant under the applicable Rules of Evidence because the State is required to show that the defendant acted with the specific intent to kill the victim;
 - d. The photographs offered by the State do not meet all the Vargas criteria, and should therefore be admissible;
 - e. Specifically, while the photos are in color and are enlargements, the *clinical somewhat sanitized setting*, photographs were taken at a hospital, as opposed to the crime scene and do not depict any other details (aside from the victim) that render the photograph gruesome;
 - f. *The photographs are graphic and sobering but not g*
The State, however, may not offer duplicative photographs during the presentation of its case;
5. Assuming the co-defendant Augustine asserts his Fifth Amendment privilege against self-incrimination, he can be declared “unavailable” under Rule 804 of the Utah Rules of Evidence;
- a. In that case, any statement made by Augustine against his interest would be admissible at Stapley’s trial;

b. Relevant statements made by Augustine that would be against his interest under Rule 804, and therefore admissible in Stapley's trial, would include Augustine's admission to being a "juggalo" because that statement indicates his bias, and interest in protecting Stapley as a fellow member of the "juggalo" family.

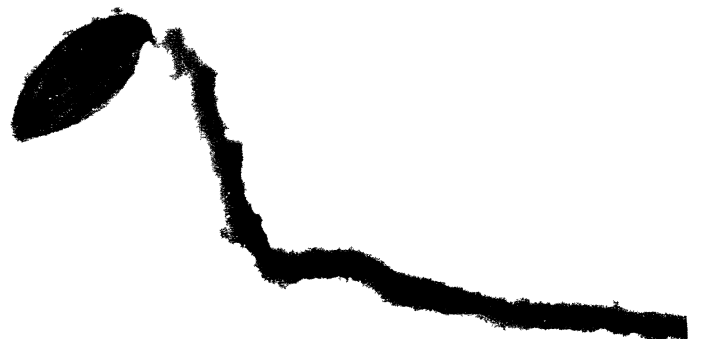
Based upon the above-referenced Findings of Fact and Conclusions of Law, the defendant's Motion in Limine is denied in part and granted in part. This matter is scheduled for jury trial on January 13 – 15, 2009.

DATED this 13 day of Apr, 2009.

BY THE COURT:



Tab D



#11



#12



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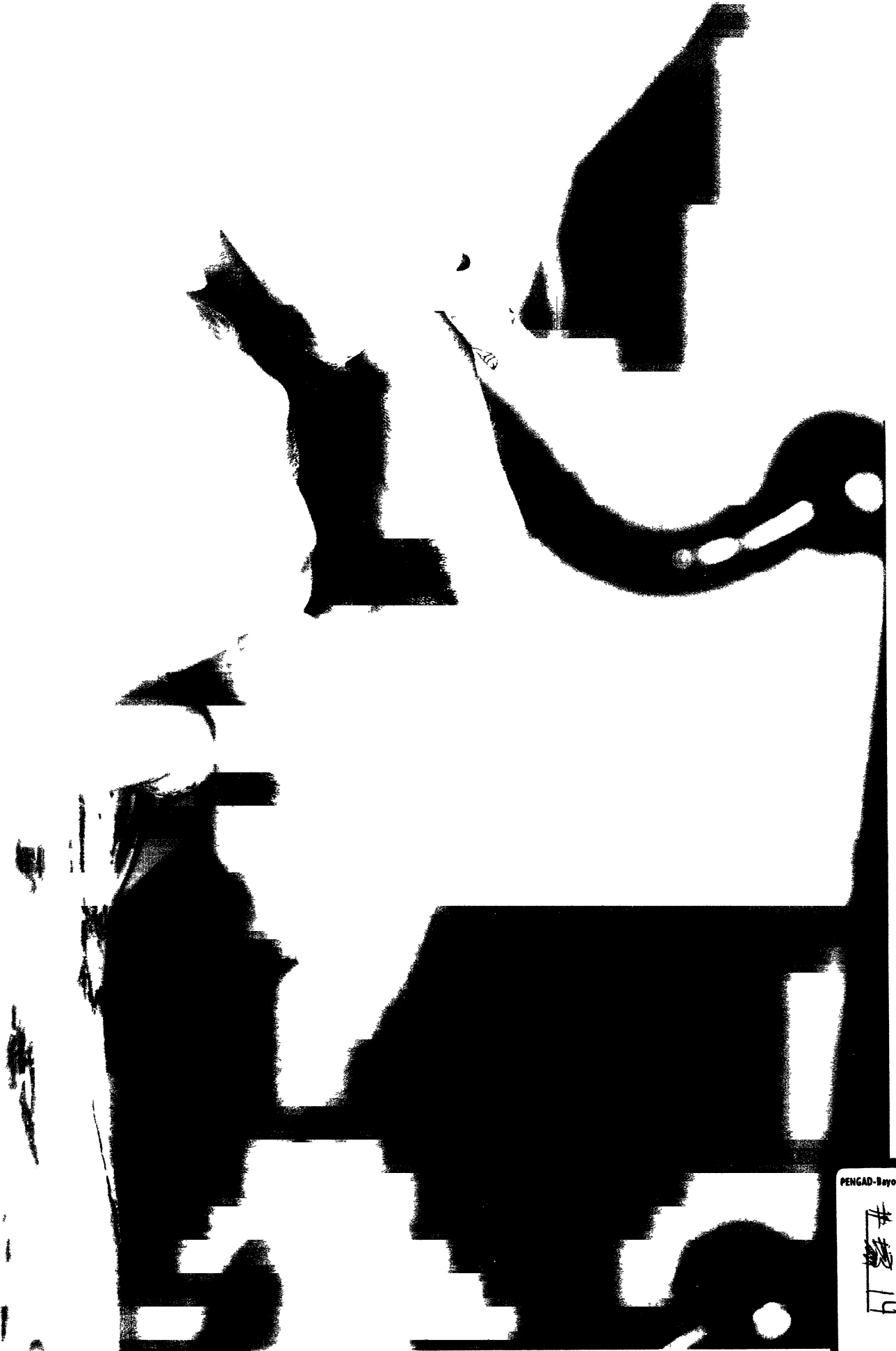
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PENGAD-Bayonne

EXHIBIT
13



PENGAD-Bayonne, N

EXHIBIT
14